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# EYING THE PROMISED LAND: THE WEARISOME QUEST FOR AN EFFECTIVE REGIONAL HUMAN RIGHTS ENFORCEMENT MECHANISM IN AFRICA

By

Nsongurua Udombana\*

"There is no prestige for a king who has no queen."

*African Proverb*

## Introductory: Why Courts Matter

Regional human rights regimes complement national systems, which sometimes suffer from "[i]nept, inefficient, under-resourced, or iniquitous governments incapable of, or perhaps even opposed to, assisting citizens' realization of their human rights".<sup>1</sup> Regional systems also complement the global system, which often is problematic in achieving consensus due to multiplicity of states and the absence of homogeneity. "As far as their processes are concerned", notes Sarkin, "regional systems for many reasons are more accessible, cheaper for litigants, and more effective in the work they do than international courts".<sup>2</sup> However, the national, regional and international regimes all share a common goal in protecting the fundamental values that human rights embody: dignity, respect, liberty, equality, freedom, justice, non-discrimination,

1. Margaux Hall & David Weiss: "Human Rights and Remedial Equilibration: Equilibrating Socioeconomic Rights" (2010-2011) 36 *Brook J Int'l L* 453 at 454.
2. Jeremy Sarkin, "Evaluating the African Commission on Human and People's [sic] Rights and the New African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and the Organization of American States", (2008) 1 *Inter-Am & Eur Hum Rts J* 199 at 210.

*etal.* Protecting these values entail mutual commitment among the global community, which explains why human rights give rise to *erga omnes* obligations, as the International Court of Justice (ICJ) explained in *Barcelona Tracton, Light and Power Co Ltd (Belg v Spain)*.<sup>3</sup>

Ironically, state sovereignty is still the dogma of international law. It is states that violate human rights; it is states that elaborate international law; and it is states that determine what mechanisms should be established to inquire into their compliance with their legal obligations. The coercing power of international law lies in the willingness of states to limit their sovereignties. This probably explains why voluntary compliance by states to their human rights obligations has been generally weak. Although there is no fool-proof mechanism of accountability, courts remain the handmaidens of the human rights system. International complaint procedures, in particular regional ones, serve important functions:

First, as a result of considering such a complaint an individual, whose rights have been violated, may have a remedy against the wrong suffered by him, and the violation could be stopped and/or compensation paid, etc; second, consideration of a complaint may result not only in a remedy for the victim of the violation, whose complaint has been considered, but also in changes to internal legislation and practice; and third, an individual complaint (or more often, a series of complaints) may serve as evidence of systematic and/or massive violations of certain rights in a given country.<sup>4</sup>

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3. *Barcelona Tracton, Light and Power Co. Ltd (Belg v. Spain)*, 1970 ICJ 4, para 32 (singling out obligations as including those derived "from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination").
  4. Rein Mullerson, "The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR" in ArieBloedet *aleds*,

Further, experiences in other regions show that judicial mechanisms are better suited to change states' conducts than diplomatic or even quasi-judicial bodies.<sup>5</sup> The European system is the light bearer in this regards.<sup>6</sup> "The European model of economic and human rights law," according to Baudenbacher, "is characterized by a high degree of judicialization that materialized in judicial independence, broad access to justice for individuals, dynamic interpretation, and—in the case of the Luxemburg courts—direct effect and a right to compensation in the event of serious violation of European law by national governments".<sup>7</sup> Diplomatic models of conflict resolution have many limitations: They act behind closed doors in order to secure confidentiality; they are under no obligation to decide, nor are they obliged to state reasons; they are not bound by precedent; the only players are governments; there is a strong element of consensus (and also of political and economic pressure); and enforcement of diplomatic outcomes may be a problem.<sup>8</sup> *Ad hoc* arbitral tribunals may be closer to courts than diplomatic panels, but they are usually established for a concrete case whose facts have already occurred. Besides, some members of a panel may be close to one party,

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*Monitoring Human Rights in Europe* (Boston-London: Dordrecht, 1993) 25 at 27.

5. Sarkin, *supra* note 2 at 210 (noting that regional courts "are more likely to achieve greater enforceability of their decisions partly because of the political will, at least in some regions, to do so by the regional system itself").
6. M. Janis, R. Kay & A. Bradley: *European Human Rights Law* (New York: Oxford Univ. Press, 1995) at 3 (arguing that the European system is the "most successful system of international law for the protection of human rights").
7. Carl Baudenbacher, "Judicialization: Can the European Model Be Exported to Other Parts of the World" (2003-2004) 39 *Texas Int'l LJ* 381 at 397.
8. *Ibid* at 282.



which may compromise its transparency.<sup>9</sup> Finally, quasi-judicial bodies, like the African Commission on Human and Peoples' Rights [African Commission], use procedures that do not meet the higher legal thresholds of a court.

One plausible reason for courts' unique authorities could be that they possess certain distinctive and even exclusive attributes that are not conferred on diplomatic and other *ad hoc* models of conflict resolution. Courts are uniquely empowered to determine legal rights and offer remedies, perhaps because of their relative insulation from political pressures or their enhanced ability to discern legal principles.<sup>10</sup> The declaratory, determinative, and adjudicatory functions may not be the exclusive characteristics of judicial power, but the power to pronounce authoritatively and conclusively on what the law is, to determine the legal rights and liabilities of contestants as they exist, and to impose a binding and enforceable obligation are distinctively and exclusively judicial functions.<sup>11</sup>

International law generally is often criticised as being weak by not offering effective enforcement mechanisms. *A fortiori*, the African regional human rights system has often been criticised for its weakness and ineffectiveness particularly as it lacks an institution capable of giving enforceable decisions. Assuming the validity of these criticisms, then states should strive to increase the strength, credibility and 'compliance pull'

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9. *Ibid.*

10. Daryl Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99 *Colum L Rev* 857 at 861. Catherine Turnert: "Human Rights and the Empire of (International) Law" (2011) 29 *Law & Ineq* 313 at 325 (arguing that the advantage of legal form is viewed in terms of impartiality and procedural regularity that law brings to bear on difficult situations).

11. B. O. Nwabueze: *Judicialism in Commonwealth Africa* (London: C. Hurst & Co, 1977) at 10-13.

of their agreements.<sup>12</sup> Yet, as the omission of a court from the African Charter on Human and Peoples' Rights<sup>13</sup> shows, states routinely fail to draft treaties that maximise the credibility of their promises. The omission of a court from Africa's regional human rights milieu has weakened the force and credibility of states' commitments to human rights protection in Africa. It has stymied the growth of human rights, diminished compliance of states to their treaty obligations, and robbed Africa of robust human rights jurisprudence. As presently constituted, the African Commission is not the, not even a, firewall against human rights abuses.

One argument for the non-inclusion of a court in the African human rights system was a bland appeal to African tradition, which promotes amicable and conciliatory methods for settling disputes as opposed to the adversarial methods of the West.<sup>14</sup> Those who hold this view point to such peaceful mechanisms as the Commission on Mediation Conciliation and Arbitration, established by the erstwhile Organization of African Unity (OAU) in 1964, and the Mechanism for Conflict Prevention, Management and Resolution of 1993 – moribund institutions that are now replaced by the African Union's (AU) Peace and Security Council (PSC). The African Charter itself encourages such a method of settlement, albeit in relation to inter-state communications.<sup>15</sup> However, this appeal to

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12. Andrew Guzman: "The Design of International Agreements" (2005) 16 *Eur J Int'l L* 579 at 580-581 (exploring the challenging dynamic that drafters face in managing acceptance and enforceability of international treaties).

13. African Charter on Human and Peoples' Rights, adopted 27 June 1981, entry into force 21 Oct. 1986, Doc OAU/CAB/LEG/67/3/Rev5 (1982) 21 *ILM* 59 [*African Charter*].

14. PM Munya: "The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges and Prospects" (2002) 1 *East Afr J Int'l & Comp L* 1 4-5.

15. *African Charter*, *supra* note 13 at arts 47 and 48.

'tradition' has never been convincing, considering that the post-colonial African states have embraced adversarial justice systems and the judicial and quasi-proceeding of UN institutions, including the ICJ.<sup>16</sup> As Kindiki rightly argues, "if it is accepted that it is (or was) culturally detestable for Africans to use the judicial system, then, African states should have immediately after independence dismantled the elaborate judicial structures bequeathed to them by the colonial masters, to replace them with consensual systems."<sup>17</sup>

A more plausible reason for the non-inclusion of a court in the African Charter was sovereign pride. African States, at the time, were not willing to submit their sovereignty to a supranational judicial body with powers to make binding orders against them.<sup>18</sup> These states failed to recognize that the human rights movement had extended the boundaries of normativity in international legal discourse.<sup>19</sup> They were

16. E Diarra, "De l'Europe a l'Afrique: Le ModeleEurop4enne est-il Exportable?" in P Tavernier, ed, *Quele Europe pour les Droits de l'Homme*(Brussels: Bruylant, 1996) 407 at 437-438.

17. KithureKindiki, "The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal Difficulties and Merits" (2007) 15 *Afr J Int'l & Comp L* 138 at 139 (noting the "[s]cientific, empirical evidence [that] exists to show that informal mechanisms of dispute resolution based on negotiation and consensus co-existed with indigenous courts administering traditional justice in pre-colonial African societies"); Taslim Elias, *Nature of African Customary Law* (3rded, Manchester Univ Press, 1972) (a seminal work that attempts to negate a number of patronizing misconceptions concerning African law); EA Keay & SS Richardson, eds, *The Native and Customary Courts of Nigeria* (London: Sweet & Maxwell, 1966).

18. Raymond Sock, "The Case for an African Court of Human and People's Rights: From a Concept to a Draft Protocol over 33 Years", *Afr Topics*, Mar-Apr 1994 at 9 (observing that the group of experts that met in Darkar, Senegal, under the Chair of Justice Keba Mbaye, was given a set of overriding principles, one of which was that they should not exceed what African states may be willing to accept).

19. Henry Steiner, "Human Rights: The Deepening Footprint" (2007) 20 *Harv Hum Rts J* 7 at 12 ("[T]he stunning achievement of the movement since its



steeped in the Westphalian – state-centric – tradition<sup>20</sup> and tended to regard international concern for their human rights records as a pretext for undermining their cherished sovereignty.<sup>21</sup> This fear of supranational bodies meant that implementation of the African Charter's provisions remains essentially a matter of domestic jurisdiction; and a few willing states have transformed the Charter into domestic law. Even presently, there is still a general reluctance by African states to sufficiently empower their regional and sub-regional judicial and quasi-judicial mechanisms. In the human rights field, states seem comfortable with a non-judicial Commission or Committee that make endless recommendations those governments ignore with ignominy.<sup>22</sup> In sum, the absence of a legitimate and robust judicial institution for human rights accountability has resulted in a culture of impunity in Africa.

To deflate these criticisms, African states started adopting specific protocols to establish some specialised regional courts,

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inception, but particularly of the last decades[,] has been the deep institutionalization of a new discourse for much of the world").

20. The erstwhile Organization of African Unity (OAU) placed strong emphasis on the *reserve domain* doctrine, which contributed to the Member States' reluctance to take human rights seriously and their persistent unwillingness to criticize one another, even in the face of flagrant human rights abuses; UO Umzurike: "The Domestic Jurisdiction Clause in the OAU Charter" (1979) 78 *Afr Aff* 197 at 202 (noting, "with regard to breaches of human rights, even of a grave nature such as genocide, the OAU has been bogged down by the domestic jurisdiction clause").
21. G Naldi, "Future Trends of Human Rights in Africa" in Michael Evans & Rachel Murray eds: *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge: Cambridge Univ Press, 2002) 1 at 2-5.
22. George Wachira & Abiola Ayinda: "Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy" (2006) 6(2) *Afr Hum Rts LJ* 465.



first in 1998,<sup>23</sup> then in 2003,<sup>24</sup> and finally(?) in 2008. The Human Rights Protocol is specific to human rights;<sup>25</sup> the ACJ Protocol is generic in its mandate.<sup>26</sup> Some AU Member States are parties to one or more of these protocols; others are not. For example, not all states parties to the 1998 Protocol are parties to the 2003 Protocol or, for that matter, the 2008 Protocol. It will be interesting to see how the future court will resolve conflicting issues arising from these multiple treaties. What is obvious is that, in terms of effective regional human rights enforcement mechanism in Africa, Africa's continental organisations have treated Africans to a drama that, so far, is playing out in three acts.

This paper traces these wearisome trajectories and questions if Africans are doomed to wait in perpetuity for a virile court to interpret and enforce the African Charter and other relevant human rights treaties? Parts two to four spotlight and analyse the contexts and contents of the various treaties aimed at effective regional judicial mechanism for human rights accountability in Africa. The final part and the

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23. Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III) [*Human Rights Protocol*]. The African Charter permits its States Parties to adopt special protocols or agreements to supplement its provisions, if necessary. *African Charter*, *supra* note 13 at art 66.

24. Protocol of the Court of Justice of the African Union, adopted July 11, 2003 (entry into force Feb 11, 2009) [*ACJ Protocol*]; K Magliveras & G Naldi, "The African Court of Justice" (2006) 66 *Heldelberg J Int'l L* 187.

25. The Human Rights Protocol envisages its Court to complement the protective mandate of the African Commission. *Human Rights Protocol*, *supra* note 23 at art 2. The Protocol, thus, anticipates cooperation and consultation between the two human rights bodies.

26. The jurisdiction of the ACJ covers, *inter alia*, over all cases relating to interpretation or application of the Act and all other treaties adopted within the framework of the AU; *ACJ Protocol*, *supra* note 24 at art 26.

conclusion reflect on the challenges still facing the African human rights system and offer a few recommendations.

### **Towards a Unified Regional Court**

The consensus during the drafting of the ACJ Protocol was that the African Human Rights Court "shall remain a separate and distinct institution from the Court of Justice of the African Union".<sup>27</sup> However, several legal and practical questions arising from the proposed dual courts remained unanswered, questions relating to 'why', 'what', 'how', 'when', and 'where': Why does Africa need two continental courts; or is it a case of blindly following the European example? What facilities exist to support two regional courts, given the inadequate funding of existing continental institutions? When will the courts become operational and where will their seats be located? How will these courts manage possible jurisdictional conflicts, given that the ACJ Protocol mandates the ACJ to interpret all continental treaties, not excluding human rights treaties? As a commentator then reasoned:

International law should develop uniformly in the African continent and throughout the international legal community. For Africa, having two courts is likely to create more confusion than benefits. The proposed two courts will probably be given both contentious and advisory jurisdictions to interpret various legal instruments including human rights treaties; thus, there is a real danger that the two

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27. Decision on the Draft Protocol of the Court of Justice, AU Doc. EX/CL/59 (III), para 2.

bodies might give conflicting interpretations before them and thus create disparate legal norms.<sup>28</sup>

Apparently unable to answer the many questions arising from the decision to set up dual supranational courts, the AU Assembly, at its 3<sup>rd</sup> Ordinary Session held in Addis Ababa, Ethiopia, in July 2004, reversed its previous decision and accepted a proposal that "the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into one Court."<sup>29</sup>

### **Adoption of the Merger Protocol and Its Statute**

The idea to merge the two courts—then as a budget control measure—was muted during the negotiation of the draft ACJ Protocol.<sup>30</sup> However, states which feared that the exercise would relegate human rights prioritization within the Court opposed the idea.<sup>31</sup> Obasanjo, then Nigeria's President and Chairperson of the AU Assembly Chairperson, reasoned that there was:

the danger of proliferation of organs of the organization and the danger of not having

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28. Nsongurua Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?" (2003) 28(3) *Brook J Int'l L* 811 at 859 [Udombana, "A Needful Duality?"].

29. Assembly/AU/Dec.45(III) (July 2004), para 4.

30. Summary of Procedures of the First Meeting of Experts/Judges and the PRC on the Draft Protocol of the Court of Justice of the African Union, 22-25 Apr 2003, Expt.Judg/Draft/Prot/ACJ/Rpt.(I). C.f. Ministerial Conference on the Draft Protocol of the Court of Justice of the African Union, AU Doc Min/Draft/Prot/ACJ/Rpt.(I) (June 2003).

31. Summary of Proceedings of the Second Meeting of Experts/Judges and PRC on the Draft Protocol of the African Court of Justice of the African Union, AU Doc Expt.Judg/Draft/Prot/ACJ/Rpt.(II) (June 2003), para 20.



enough funds to do what we should do and just proliferating organs. ... Why shouldn't the Court of Justice also take along with it the Court on Human and Peoples' Rights so that we have a Court of Justice with a division, if you like for border issues, a division for human rights issues, a division for cross border criminal issues or whatever. ... I will suggest in that case that the Decision on the Operationalisation of the African Court on Human and Peoples' Rights should be removed for now. Alright? That is done.<sup>32</sup>

It looks like Obasanjo's military and, hence, authoritarian background played out at the Summit, as he did not even allow his peers to debate his proposal before concluding: "Alright? That is done". Nonetheless, his reasoning echoed a similar recommendation made by a commentator on the eve of adoption of ACJ Protocol in 2003,<sup>33</sup> though his views were not supported by other commentators who argued that:

A unified pan-African Court, which is purportedly proficient in all areas of law, is

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32. Report on the Decision of the Assembly of the Union to Merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, AU Doc EX.CL/162(VI), para 3.

33. Udombana, "A Needful Duality?" *supra* note 28 at 864-865 ("A realistic approach is for the AU to establish and strengthen one judicial institution, which may be, but not necessarily, the African Human Rights Court... There is an alternative approach... The AU should establish the AU Court, not as an arm of the AU but as an autonomous institution capable of addressing the myriad of problems confronting the continent. The AU Court could have different chambers ... Thus, one chamber could be seized with matters of international economic law including economic integration, another with human rights issues, and still others with environment or international criminal law including terrorism, etc").

perhaps not the best forum to handle such specialized matters with grave implications on the rights and dignity of individuals and groups, on the one hand, and the functionalist and technocratic process of economic integration, on the other. Only a specialized human rights court is likely to be more credible to the victims of human rights violations since it will not only have the capacity but will also be seen to have the capacity to adjudicate human rights matters effectively.<sup>34</sup>

The July 2004 AU Assembly decision to merge the African Human Rights Court with the proposed ACJ Court<sup>35</sup> set in motion the drafting process for a merger protocol. Meanwhile, the AU Commission recommended that the jurisdiction of the two courts should be retained, but that it was possible for one court to administer the two protocols through special chambers. It further recommended that the necessary amendments to both protocols be effected through the adoption of a new protocol by the AU Assembly.<sup>36</sup> However, there was still the legal problem of how to merge a protocol that had already entered into force with one that was still floating, at best. A meeting of government legal experts, which met in Addis Ababa in March and April of 2005, acknowledged the complexities involved in creating an integrated judicial system.

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34. Frans Viljoen & Evarist Baimu: "Courts for Africa: Considering the Coexistence of the African Court on Human and Peoples' Rights and the African Court of Justice" (2004) 22 *Neth Q Hum Rts* 241 at 255.

35. Assembly Decision on the Seats of the Organs of the African Union, AU Doc Assembly/AU/Dec.45 (III) Rev1 (July 2004).

36. Coalition for an Effective African Court, *About the African Court*, online, Coalition for an Effective African Court on Human and Peoples' Rights <[http://www.africancourtcoalition.org/editorial.asp?page\\_id=16](http://www.africancourtcoalition.org/editorial.asp?page_id=16)>.

It recommended that the operationalization of the African Human Rights Court should continue; that the ratification of the ACJ Protocol should also continue until it comes into force; and that only then should the process to integrate the two courts resume.<sup>37</sup> The AU Executive Council approved this recommendation at its Abuja Summit in January 2005.<sup>38</sup>

At its July 2005 Summit in Libya, the AU Assembly decided to separate the question of establishing the Human Rights Court from the question of its merger with the ACJ. It approved the continuing operationalization of the Human Rights Court pending further reflections by AU legal experts – in consultation with states – on consequences of the merger. The Assembly mandated the AU Chairperson to work out modalities to implement the Decision.<sup>39</sup> Working on preliminary drafts prepared by Algerian Foreign minister, Mohammed Bedjaoui (former President of the ICJ), the Working Group produced a “Draft Protocol on the Integration of the African Court on Human and Peoples’ Rights and the Court of Justice of the AU.” The Executive Council received the Draft Protocol in January 2006 and asked for comments from AU Member States.<sup>40</sup>

The Draft Protocol, having received inputs from Member States, was submitted to a joint meeting of the Permanent Representatives Committee (PRC) and legal experts from Member States held in Addis Ababa in May 2006. The issues

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37. *Ibid.*

38. Executive Council Decision on the Merger of the African Court and the Court of Justice of the African Union, AU Doc EX.CL/Dec.165 (VI) (Jan 2005).

39. AU Doc Assembly/AU/Dec.83(V) (July 2005).

40. Executive Council Decision on the Merger of the African Court and the Court of Justice of the African Union, AU Doc EX.CL/Dec.237 (VIII) (Jan 2006).



that dominated that meeting were, the composition of the Merged Court in relation to the number and quorum of judges; the geographical representation of judges on the Court; whether the AU Assembly would have the power to increase the number of judges once the Statute establishing the Court entered into force; whether the Assembly would confer special jurisdiction on the Court on matters other than those provided for in its Statute; and the content of the Court's rules of procedure.<sup>41</sup> The meeting, nevertheless, prepared the final Draft Protocol,<sup>42</sup> which it presented to the Executive Council; and the Council referred the Draft to the Ministers of Justice and Attorneys-General from Member States, "for finalization and submission of a report at the next Ordinary Session of the Executive Council, in January 2007."<sup>43</sup> It was in April 2008 that the African Justice Ministers considered and approved the draft, which was subsequently submitted to the Executive Council for approval at its 13<sup>th</sup> Ordinary Session. At its 11<sup>th</sup> Summit in Sharm El-Sheikh, Egypt, in July 2008, the AU Assembly adopted the Merger Protocol.<sup>44</sup>

In adopting the Protocol, African leaders recalled "their commitment to take all necessary measures to strengthen their

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41. Chaloka Beyani: "Recent Developments in the African Human Rights System 2004-2006" (2007) 7 *Hum Rts L Rev* 582 at 585 [BeyaniI] (noting: "With consensus seen as the best way of reaching decisions, the Draft Protocol offered the benefit of friendly compromises on some of these issues").

42. Draft Protocol on the Statute of the African Court of Justice and Human Rights, AU Doc EX.CL/211 (VIII) Rev.1, Annex II (May 2006) [*Draft Protocol*].

43. Report on the Draft Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, AU Doc EX.CL/Dec.283(IX).

44. Protocol on the Statute of the African Court of Justice and Human Rights, adopted July 2008 (not yet in force), AU Doc Assembly/AU/13(XI) (2008) [*Merger Protocol*]. The Statute of the African Court of Justice and Human Rights is annexed to the Merger Protocol [*Merger Statute*].

common institutions and to endow them with the necessary powers and resources to carry out their missions effectively.”<sup>45</sup> On the day of its adoption, the Assembly called “on Member States to sign and ratify the Protocol ... as expeditiously as possible so as to enable the Protocol to enter into force and ensure the speedy operationalization of the merged Court”.<sup>46</sup> The Protocol will enter into force 30 days after the deposit of ratification instruments by fifteen States Parties.<sup>47</sup> The first problem that readily reveals itself is that some States which are parties to the Human Rights Protocol, but which, for whatever reason, do not wish to ratify the Merger Protocol, shall not have standing before the new Court. As will be shown shortly, personal standing is reserved, *inter alia*, to States Parties to the Merger Protocol, not the earlier ones.

### **Explaining the Protocol's Intent**

The Merger Protocol situates the new Court within the extended goals of the AU and the African Charter.<sup>48</sup> The Court is conceived to “supplement the mandate and efforts of other continental treaty bodies as well as national institutions in protecting human rights,”<sup>49</sup> including the African Commission and the African Committee.<sup>50</sup> The Merger Protocol also recalls the Women's Protocol,<sup>51</sup> which implementation is presently vested in the African Commission and the Human Rights Court. The Protocol merges the African Human Rights Court

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45. *Merger Protocol*, *supra* note 44 at preamble.

46. Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice, AU Doc Assembly/AU/13(XI) (July 2008), at para 3.

47. *Merger Protocol*, *supra* note 44 at art 9(1).

48. *Ibid* at preamble at paras 1 and 2.

49. *Ibid* at para 10.

50. *Ibid* at para 5.

51. *Ibid* at preamble para 8.

and the ACJ Court "into a single Court" known as "The African Court of Justice and Human Rights" ("Merged Court").<sup>52</sup> The *Encarta Dictionary* defines the word 'merge' as, "to combine or unite with something to form a single entity", or "to blend, or make two or more things blend, gradually". In corporate law, a merger is the consolidation of two or more corporations into one under the same governing organization. Thus, the intent of the Merger Protocol is a complete fusion of the institutions and management of the two courts into one, with a pool of judges chosen in accordance with the provisions of the Protocol and its annexed Statute.

Expectedly, the Protocol contains transitional provisions relating to the Human Rights Protocol, but there are no transitional provisions for the ACJ Protocol, which has now entered into force. This omission was preventable; the drafters of the Merger Protocol should have foreseen the entry into force of the ACJ Protocol, even if not the operationalization of the Court. Meanwhile, the terms of office of judges of the Human Rights Court shall end after election of judges of the Merged Court, provided that the former judges shall remain in office until the new judges are sworn in.<sup>53</sup> This means that, *de jure*, they cease to be judges after the election of the new judges, but *de facto*, they will continue to handle any pending human rights cases until the elected judges of the Merged Court are sworn in, which could take an interval of some months. This means that a smooth transition of judges of the present Human Rights Court to the merged is not guaranteed as a matter of course,<sup>54</sup> but it is hoped that some of them will be re-elected into the Merged Court to ensure a smooth transition.

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52. *Ibid* at art 2.

53. *Ibid* at art 4.

54. *Beyani, supra* note 41 at 585.



There is also a transitional provision relating to the Registrar of the Human Rights Court, who shall remain in office until the appointment of a Registrar for the Merged Court.<sup>55</sup> The Merger Protocol also provides for the provisional validity of the 1998 Protocol, which shall remain in force for a transitional period not exceeding one (1) year or any other period determined by the Assembly, after entry into force of the Merger Protocol. This period is to enable the Human Rights Court to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the Merged Court.<sup>56</sup> Meanwhile, the States Parties have settled in advance the seat of the Merged Court, which "shall be same as the Seat of the African Court on Human and Peoples' Rights".<sup>57</sup> The African Human Rights Court is presently seated in Arusha,<sup>58</sup> in a temporary building donated by the Government of Tanzania.

The Merger Protocol provides that pending cases before the African Human Rights Court that are not concluded before the entry into force of the new Protocol "shall be transferred to the Human Rights Section" of the Merged Court.<sup>59</sup> What does the phrase "shall be transferred" mean? Will such cases begin *de novo* before the new judges – as is often the case in, say, most common law jurisdictions – or will the case simply continue from where it stopped? What happens where a transferred case is against a country that made the Article 34(6) Declaration under the 1998 Protocol accepting the jurisdiction of the

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55. *Merger Protocol*, *supra* note 44 at art 6.

56. *Ibid* at art 7.

57. *Merger Statute*, *supra* note 44 at art 25(1).

58. Arusha, Tanzania, is viewed as The Hague of Africa, because it presently hosts three international judicial bodies: the International Criminal Tribunal for Rwanda (ICTR), the African Human Rights Court, and the Court of Justice of the East African Community (EAC).

59. *Merger Protocol*, *supra* note 44 at art 5.

Human Rights Court to receive cases directly from individuals and NGOs, but that country has not made a similar declaration under the Merger Statute? The answer probably lies in the Merger Protocol's further qualification, to wit, "on the understanding that such cases shall be dealt with in accordance with" the 1998 Protocol.<sup>60</sup>

### Composition and Independence

The manner in which the Merged Court is constituted will determine its effectiveness. The independence of the Court, for example, will be a *sine qua non* to effective redress, whether on human rights and other types of legal rights. This segment, therefore, closely examines the provisions of the Merger Statute on the composition and independence of the Court, in comparative perspective.

#### 1. Composition

The Court consists of a General Affairs Section and a Human Rights Section, each section constituted by eight Judges.<sup>61</sup> The sixteen judges of the "Full Court" will be elected by the AU Executive Council and appointed by the AU Assembly,<sup>62</sup> a rather odd provision since the AU Assembly usually 'elect' the principal officers of the AU organs, including, judges of the current Human Rights Court.<sup>63</sup> It is even not clear what constitutes 'appointment' as distinct from 'election,' and the 'Definitions' clause provides no guidance. Nonetheless, the judges "shall be elected through secret ballot by a two-thirds majority of Member States with voting rights."<sup>64</sup> In electing

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60. *Ibid.*

61. *Merger Statute*, *supra* note 44 at art 16.

62. *Ibid* at art 7(1).

63. *Human Rights Protocol*, *supra* note 23 at art 14(1); *ACJ Protocol*, *supra* note 24 at art ((1)(h).

64. *Merger Statute*, *supra* note 44 at art 7(2).

the judges, the Assembly must ensure, first, "equitable representation of the regions and the principal legal traditions of the Continent"<sup>65</sup> and, second, "equitable gender representation."<sup>66</sup>

The provision on regional representation was one of the hotly debated issues during the Protocol's drafting process. States from North Africa argued in favour of strict numerical equality, advocating a 3-3-3-3-3 representation per region. Most other states preferred a 4-3-3-3-3 equation, with the West (with 16 members) and North (with five members) represented according to the weight of their AU membership.<sup>67</sup> The current composition of the Human Rights Court roughly follows the 4-3-3-3-3 "equitable representation." The provision on gender representation is a positive response to the increasing advocacy for mainstreaming of women in national, sub-regional, and regional bodies. The provision is also in line with demands of the Women's Protocol.<sup>68</sup>

The judges must be nationals of State Parties,<sup>69</sup> "elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law

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65. *Ibid* at art 7(4).

66. *Ibid* at art 7(5).

67. Viljoen, *supra* note 34 at 459 n 231.

68. See Women Protocol, *supra* note 13 at art 8(e) (urging states "take all appropriate measures to ensure ... that women are represented equally in the judiciary and law enforcement organs" *ibid* para 8); AU Act, Constitutive Act of the African Union, adopted Jul 11, 2010, entry into force May 26, 2001[AU Act] at art 4(1) (promoting "gender equality"); Solemn Declaration on Gender Equality in Africa, AU Doc Assembly/AU/Decl.12 (III) (July 2003).

69. *Merger Statute*, *supra* note 44 at art 3(1).



and/or, human rights law.”<sup>70</sup> By this provision, all judges of the Court need not be human rights experts (though they must be international law experts), but it is vital that the judges that will be appointed to the Human Rights Section of the Court should have “recognized competence and experience” in international human rights law and/or practice.

All judges of the Merged Court shall, except the President and Vice-President, perform their functions on part-time basis.<sup>71</sup> In making the Court part-time, States Parties failed to give serious thoughts to the diverse legal (including human rights) issues that should commend themselves for judicial determination in Africa, all things being equal. Judges of most contemporary international judicial institutions – for example, the ICJ, International Criminal Court (ICC), European Court of Justice and European Court of Human Rights – are constituted on a full-time basis; only the Inter-American Court on Human Rights operates on a part-time basis. Having opted for a single regional court, the AU Assembly should have allowed the Court to operate full-time so as to fully discharge its mandate. Thus is also an issue of diplomacy. A part-time judicial institution does not project the AU glowingly before other continental bodies.

The Merger Statute provides that each Section of the Full Court “may, at any time, constitute one or several chambers.”<sup>72</sup> A sectional or chambers’ judgment is taken as that of the Court;<sup>73</sup> indeed, the Protocol defines ‘Court’ to mean “the African Court of Justice and Human Rights *as well as its sections and chambers*.”<sup>74</sup> The chamber system is not really

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70. *Ibid* at art 4.

71. *Ibid* at art 8(4).

72. *Ibid* at art 19(1). The quorum required to constitute such chambers shall be determined in the Rules of Court.

73. *Ibid* at art 9(2).

74. *Ibid* at art 1 (emphasis supplied).

new. The ICJ has something similar; its Statute allows the Court to occasionally form one or more chambers composed of three or more judges as the Court may determine.<sup>75</sup> Such chambers are authorized to deal with particular classes of cases, for example, cases and cases relating to transit and communications.

The judges shall hold their offices for six years, but they may be re-elected once.<sup>76</sup> The Protocol provides for scattered election, to ensure continuity of pending cases. Consequently, "the term of office of eight (8) judges, four (4) from each section, elected during the first election shall end after four (4) years."<sup>77</sup> The tenure of judges whose terms will expire after the initial four-year period shall be determined, for each section of the Court, "by lot drawn by the Chairperson of the Assembly or the Executive Council, immediately after the first election."<sup>78</sup>

## 2. *Independence*

The Merger Statute seeks to secure the independence of the Court in many ways. It provides, more generally, that the independence of the judges shall be fully ensured in accordance with international law.<sup>79</sup> It expects the Court to act impartially, fairly and justly<sup>80</sup> and that the Court and its judges shall not be subject to the direction or control of any person or body in the discharge of their judicial functions.<sup>81</sup> The

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75. Statute of the International Court of Justice, June 26, 1945, [ICJ Statute], at art 26.

76. *Merger Statute*, *supra* note 44 at art 8(1).

77. *Ibid.*

78. *Ibid* at art 8(2).

79. *Ibid* at art 12(1).

80. *Ibid* at art 12(2).

81. *Ibid* at art 12(3).

"Solemn Declaration" includes a clause that a judge of the Court shall 'faithfully,' 'impartially,' and 'conscientiously' exercise the duties of his office, "without fear or favour, affection or ill will and that [he] will preserve the integrity of the Court."<sup>82</sup>

The Statute provides, more specifically, that a judge shall not be suspended or removed from office except where, on the recommendation of two-thirds majority of his/her colleagues, he/she no longer meets the requisite conditions to be a judge.<sup>83</sup> Should such a situation occur, then the President shall communicate the recommendation for the suspension or removal of the Judge to the Chairperson of the AU Assembly through the Chairperson of the AU Commission; and "[s]uch a recommendation of the Court shall become final upon its adoption by the Assembly."<sup>84</sup> Under the Human Rights Protocol, "the decision of the Court shall be final unless it is set aside by the Assembly at its next session."<sup>85</sup> It is arguable which of the two provisions better secure the independence of the Court.

The judges of the Court "shall enjoy, from the time of their election and throughout their term of office, the full privileges and immunities extended to diplomatic agents in accordance with international law;"<sup>86</sup> and at no time shall they be liable "for any act or omission committed in the discharge of their judicial functions."<sup>87</sup> The Statute also lays down the conditions for excluding a judge from participation in the settlement of a

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82. *Ibid* at art 11(1).

83. *Ibid* at art 9(2).

84. *Ibid* at arts 9(3) and (4).

85. *Human Rights Protocol*, *supra* note 23 at art 19(2).

86. *Merger Statute*, *supra* note 44 at art 15(1); *ICJ Statute*, *supra* note 75 at art 19. ("The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities").

87. *Merger Statute*, *supra* note 44 at art 15(2).



case,<sup>88</sup> all aimed at preventing the charge of bias or its likelihood. Similarly, a Judge is not expected to engage in other activities that are incompatible with his judicial function or that might infringe on his independence or impartiality.<sup>89</sup> These important expressions of international law are aimed at ensuring the full independence of the Court and its judges. While these measures are necessary, they are not sufficient to ensure institutional independence in the absence of other measures, such as sufficient funding.

## **Jurisdiction**

Three categories of jurisdiction are provided for under the Merger Protocol and Statute: subject-matter, personal, and advisory.

### *1. Jurisdiction Ratione Materiae*

Both the jurisdictions of the Human Rights Court and ACJ under their respective protocols are incorporated in defining the jurisdiction *rationemateriae* of the Merged Court. The matters covered have already been highlighted in part three. In general, they include all cases and all legal disputes submitted to it relating, *inter alia*, to the interpretation and application of the AU Act; interpretation, application or validity of other treaties and subsidiary legal instruments adopted within the framework of the AU/OAU; and the interpretation and the application of the African Charter, the African Child Charter, the Women Protocol, or any other legal instrument relating to human rights and ratified by the State concerned.<sup>90</sup>

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88. *Ibid* at art 14.

89. *Ibid* at art 13(1).

90. *Ibid* at art 28.

The new Court obviously has an expansive jurisdiction compared to any previous institutional experiment in Africa. It will interpret not only legal instruments adopted under the auspices of the OAU/AU but also those adopted outside the Continent but ratified by the State before it. The African Child Charter is also specifically included among treaties within the Court's ambit. Until now, the Charter had no implementing judicial institution, other than the African Committee with mandate limited largely to investigating children's rights violations and issuing reports and recommendations. With this inclusion, the African Child Charter stands on the same footing with the African Charter and Women Protocol which, hitherto, were subject to interpretation and application by the Human Rights Court.

The Statute carefully compartmentalizes the Court's jurisdiction. The General Affairs Section is competent to hear all cases submitted under Article 28 of the Statute "*save those concerning human and/or peoples' rights issues*,"<sup>91</sup> while the Human Rights Section shall be competent to hear all cases relating to human and/or peoples rights.<sup>92</sup> The Statute spells out the procedure to be followed in contentious cases, which depends on the subject-matter. Cases brought before the General Affairs Section shall be submitted by written application addressed to the Registrar, indicating the subject of the dispute, the applicable law, and basis of jurisdiction.<sup>93</sup> However, cases brought before the Human Rights Section shall be submitted by a written application to the Registrar, indicating the rights alleged to have been violated, and, insofar as it is possible, the provisions of the relevant human rights

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91. *Ibid* at art 17 (italics in the original).

92. *Ibid*.

93. *Ibid* at art 33(1).

instrument on which it is based.<sup>94</sup> In all cases, the Registrar is mandated to immediately give notice of the application to all parties concerned and to the relevant AU organs.

The Court will draw up its "Rules of Court," "taking into account the complementarity between the Court and other treaty bodies of the Union."<sup>95</sup> It is imperative that the Rules should be simple and capable of fostering speed without sacrificing quality. Surprisingly, the Statute fails to provide for amicable settlement of disputes in a Continent that prides itself as having a uniquely conciliatory traditional justice system. It is not clear if this omission was deliberate, considering that 'amicable settlement' features prominently in previous regional and sub-regional instruments, including the African Economic Community (AEC) Treaty,<sup>96</sup> the African Charter,<sup>97</sup> the Human Rights Protocol,<sup>98</sup> and the Treaty Establishing the Southern African Development Community (SADC).<sup>99</sup> The SADC Treaty, for example, provides that disputes arising from the interpretation and applicable of the SADC Treaty should be settled in a friendly manner. Only if amicable attempt fails should the dispute be referred to the SADC Tribunal.<sup>100</sup>

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94. *Ibid* at art 34(1).

95. *Ibid* at art 38.

96. African Economic Community Treaty, adopted June 3, 1991, entry into force May 11, 1994, 30 *ILM* 1241, Art 87(1) [AEC Treaty].

97. *African Charter*, *supra* note 13 at paras 47 and 48.

98. *Human Rights Protocol*, *supra* note 23 at para 9 (providing: "The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter").

99. Treaty Establishing the Southern African Development Community, adopted Aug 17, 1992 (1993) 32 *ILM* 116 [SADC Treaty].

100. *Ibid* at para 32.



## 2. *Jurisdiction Ratione Personae*

A major criticism of the Human Rights Protocol has been that individuals and non-governmental organizations (NGOs) do not have an automatic standing before the Human Rights Court. Regrettably, this provision was smuggled into the final Draft Protocol, despite strong opposition by segments of Africa's civil society. The only entities that will have automatic standing before the new Court in respect of human rights matters are State Parties to the Protocol; the African Commission; the African Committee; African Intergovernmental Organizations accredited to the AU or its organs; and African National Human Rights Institutions.<sup>101</sup> Individuals or NGOs will be entitled to submit human rights cases against a State Party only where such a State has made a declaration accepting the competence of the Court to receive cases involving the State in question.<sup>102</sup>

The Draft Protocol proposed that a wording similar to Article 34(6) of the Human Rights Protocol be omitted and that a general clause should be inserted allowing states explicitly to enter reservations that are compatible with the Protocol's object and purpose.<sup>103</sup> Accepting this proposal would have meant that "states accept direct access of the Court, unless they 'opt out' by entering a reservation to that effect."<sup>104</sup> However, the adopted Protocol requires that states 'opt in' to accept direct individual or NGO access to the Court with respect to human rights matters. The requirement effectively shuts the door against many individuals and NGOs, the very entities that drive human rights. As Odinkalu and Mbelle argue, "African leaders know their states will not sue one

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101. *Merger Statute*, *supra* note 44 at para 30.

102. *Ibid* at para 30(f); *Merger Protocol*, *supra* note 44 at para 8(3).

103. *Viljoen*, *supra* note 34 at 459.

104. *Ibid*.

another for human rights violations or for election-rigging. By denying individual victims access to the new court, governments will close an avenue through which atrocities might be addressed, effectively rendering the court still-born."<sup>105</sup>

This requirement of a state declaration is also superfluous, because the African Charter already provides a check against vexatious and frivolous petitions through the admissibility procedure,<sup>106</sup> especially the requirement of exhaustion of local remedies.<sup>107</sup> The local remedies rule – the rule that “a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question at [the] international level”<sup>108</sup> – reinforces the subsidiary and complementary relationship of the international system to systems of internal protection. Imposing further, onerous, requirements in the Merger Protocol is like attempting to kill a snake with a sledgehammer.

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105. Odinkalu & Mbelle: “Africa: Continent Needs Effective Human Rights Court” (2008), online: All Africa

<http://allafrica.com/stories/200806240710.html?page=2>.

106. *African Charter*, *supra* note 13 at art 56. *C.f.* *Human Rights Protocol*, *supra* note 23 at art 6(2) (“The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter”).

107. *African Charter*, *supra* note 13 at art 56(5) (providing “Communications relating to human and peoples’ rights referred to in 55 received by the Commission, shall be considered if they ... [a]re sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”).

108. A.A. Cançado Trindade: *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge: Cambridge Univ. Press, 1983) at 1; and generally Nsongurua Udombana, “So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights” (2003) 97(1) *Am J Int’l L* 1.

The provision denying individuals and NGOs automatic standing is also at variance with current international legal norms and practice, which vests individuals with rights and responsibilities, a shift from the 'hobbesian' conception of sovereignty, which centred on the state, to a 'kantian' notion of sovereignty, which centres on universal citizenship. In his address at the closing ceremony of the seminar on "The Inter-American System of protection of Human Rights on the Eve of the XXIst Century", held on November 24, 1999, in San José, Costa Rica, Judge Antônio Augusto Cançado Trindade—former President of the Inter-American Court—stated:

The widest participation of the petitioners in all stages of the procedure before the Court (*locus standi*) is to be secured, as part of the process conducive to the crystallization of the right of direct access to the Court (*jus standi*) by the individuals as subjects of the International Law of Human Rights, endowed with full procedural capacity.<sup>109</sup>

Almost all of the major human rights treaties give individuals automatic access before their judicial mechanisms, including the European Convention, which provides: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation ... The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".<sup>110</sup> Even sub-regional economic treaties give individuals direct access before their courts, like the Protocol

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109. Quoted in Information Note on the First Meeting of African Court on Human and Peoples' Rights, available at [http://www.africa-union.org/root/AU/Conferences/Past/2006/July/summit/doc/CADHP/BACK\\_GROUND\\_DOCUMENT\\_ON\\_THE\\_AFRICAN\\_COURT.doc](http://www.africa-union.org/root/AU/Conferences/Past/2006/July/summit/doc/CADHP/BACK_GROUND_DOCUMENT_ON_THE_AFRICAN_COURT.doc).

110. Convention for the Protection of Human Rights and Fundamental Freedoms, adopted Nov 4, 1950, entry into force Sept 9, 1953, ETS 5; 213 UNTS 221 at art 34.



on the ECOWAS Court of Justice.<sup>111</sup> Why are African States fearful of their own continental judicial institution? A government that truly governs in the best interest of its people should have no fears of an independent judiciary.<sup>112</sup>

### 3. *Advisory Jurisdiction*

Besides contentious matters, the Court may give advisory opinion "on any legal question" at the request of the principal organs of the AU.<sup>113</sup> Unlike contentious matters, the Statute does not indicate which section of the Court should handle what type of 'legal question,' but there is a proviso that "A request for an advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts."<sup>114</sup> The Statute sets the procedure for advisory opinion: a written request must be laid before the Court, containing "an exact statement of the question upon which the opinion is required and shall be accompanied by all relevant documents."<sup>115</sup> The Registrar shall forthwith give notice of the request to all States or organs entitled to appear before the Court.<sup>116</sup> Written and/or oral statements are then sought and received from interested parties, whereupon the Court "shall deliver its advisory

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111. Supplementary Protocol to the Protocol on the ECOWAS Community Court of Justice 2005, Art 10 [*ECOWAS Court Supplementary Protocol*]; Henry Onoria, "Locus Standi of Individuals and Non-State Entities before Regional Economic Integration Judicial Bodies in Africa" (2010) 18 *Afr J Int'l & Comp L* 143 (appraising the role that *locus standi* of individuals and non-State entities has on economic integration processes in Africa).

112. *Media Rights Agenda & Others v. Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 81 [*African Commission*].

113. *Merger Statute*, *supra* note 44 at art 53(1).

114. *Ibid* at art 53(3).

115. *Ibid* at art 53(2).

116. *Ibid* at art 54(1).

opinion in open court, notice having been given to the Chairperson of the Commission and Member States, and other International Organizations directly concerned."<sup>117</sup>

Like the name implies, advisory opinions are not binding, but they often provide guidance to the advisee and to Member States desiring to introduce necessary domestic reforms or to oppose legislation that would be in breach of existing law. Governments usually "find it easier to give effect to advisory opinion than to comply with a contentious decision in a case they lost."<sup>118</sup> Advisory opinions also provide guidance to domestic courts grappling with interpretation and application of especially international law related issues.

### Remedial Authority

International (human rights) law recognizes a right to a remedy.<sup>119</sup> One of the features that distinguish a judicial from a

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117. *Ibid* at art 55.

118. Thomas Buergenthal: "The European and Inter-American Human Rights Courts: Beneficial Interaction" in Paul Mahoney *et al* eds, *Protecting Human Rights: The European Perspectives* (Koeln: Carl Heymanns Verlag KG, 2000) 123 at 131.

119. Universal Declaration of Human Rights 1948, GA Res 217A (III), UN Doc A/810 at 71 (1948), Art 8 [UDHR] (providing that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or law"); International Covenant on Civil and Political Rights, 99 UNTS 171 (Dec 16, 1966) [ICCPR], Arts 2(3), 9(5) & 14(6) (containing three separate articles addressing the right of access to an authority competent to afford remedies – including the right to an effective and enforceable remedy – and the right of anyone unlawfully arrested, detained, or convicted to have an enforceable right to compensation); Commission on Human Rights, UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Res 2005/35 (Apr 2005) (containing both procedural and substantive dimensions to the right to reparations). The Basic Principles and Guidelines do not create any new substantive international or domestic legal obligations; they merely identify mechanisms, modalities, procedures, and methods of implementing existing legal obligations.

quasi-judicial body is their remedial powers. One weakness of the African Commission has been its lack of judicial teeth to bite where it finds clear cases of human rights violations. The Merged Court is not so constituted; *a contrario*, its Statute expressly grants it powers to offer structural remedies. It provides that "the Court may, if it considers that there was a violation of a human or peoples' right, order any appropriate measures in order to remedy the situation, including granting fair compensation."<sup>120</sup> Compensation is a form of reparation; and the goal of reparation is to promote justice by redressing injury suffered. There are basically two elements involved in reparation claims: the scope of the injury and magnitude of the misconduct.<sup>121</sup> It is hoped that the Merged Court, particularly its Human Rights Section, will bear this in mind when ordering compensations under the Statute.

The Court may also, on its own motion or the parties' application, indicate provisional measures if it considers that circumstances require preserving the *res*.<sup>122</sup> Provisional or interim measures are particularly useful in the regime of human rights protection because, most often, their complaint procedures are long-drawn. A party may incur irreparable damage, physically or to property rights, during such time-consuming administrative and judicial procedures. Sometimes, the authority to issue such measures are expressly provided for in treaties establishing each tribunal (as in this case) or through the back door of procedural rules.<sup>123</sup> Including provisional

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120. *Merger Statute*, *supra* note 44 at art 45.

121. Dinah Shelton: *Remedies in International Human Rights Law* (Oxford: Oxford Univ. Press, 2006) (providing an overview of the law and practice governing human rights remedies).

122. *Merger Statute*, *supra* note 44 at art 35(1).

123. Nsongurua Udombana, "Interim Measures: A Comparative Study of Selected International Judicial Institutions" (2003)43(3) *Indian J Int'l L* 479.



measures in a treaty should create a stronger legal obligation on States Parties than if such power was subsequently defined in Rules of Procedure.

### Relationship with Other Regional Mechanisms

The African Court Protocol situates its Court within the circumference of existing, especially human rights, institutions. The Court is adopted to "supplement the mandate and efforts of other continental treaty bodies as well as national institutions in protecting human rights."<sup>124</sup> The Protocol specifically references the African Commission and the African Committee, which is empowered to receive individual and inter-state communications and is mandated to examine state reports<sup>125</sup> and to undertake fact-finding missions.<sup>126</sup> There are other treaty bodies within the AU organs that have bearings on human rights. Among these are the AU Assembly, Executive Council, Permanent Representative Council, PAP, AU Commission, and PSC. As the 'Supreme Organ', the AU Assembly performs the law-making function of setting human rights and other standards and elaborating soft laws (declarations, resolutions, decisions, *etcetera*), as well as the executive function of monitoring implementation of policies and decisions and ensuring compliance by Member States.<sup>127</sup>

Other quasi-judicial bodies with specific human rights mandate – besides the African Committee – include the African Commission, the African Coordinating Committee of National Human Rights Institutions, and African Peer Review Mechanism (APRM), a voluntary self-monitoring mechanism created under the NEPAD to promote good governance in

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124. *Merger Protocol*, *supra* note 44 at preamble.

125. *African Child Charter*, *supra* note 13 arts 43 and 44.

126. *Ibid* at para 45(1). This mandate mirrors that of the African Commission, as authorized by Art 46 of the *African Charter*, *supra* note 13

127. *AU Act*, *supra* note 68 at art 9.



Africa. The Merger Protocol provides that the attainment of the objectives in the principal regional human rights treaties requires the establishment of a judicial organ to supplement and strengthen the mission of these quasi-judicial implementing bodies.<sup>128</sup> Certainly, the proliferation of these mechanisms, some with their own human rights mandate, makes coordination an imperative. The greatest challenge will be how to construct a united response to human rights from this plethora of institutions. In 2006, the Executive Council of the AU stressed "the need for closer collaboration between various policy organs with competence in human rights as well as with national human rights bodies".<sup>129</sup> The future Court could play a significant role in accomplishing that collaboration.

### **An Endless Wilderness Journey?**

October 2011 marked the thirtieth anniversary of the adoption of the African Charter. The year 2011 also marks the tenth anniversary of the entry into force of the AU Act, in which Member States promised, *inter alia*, "to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them discharge their respective mandates effectively".<sup>130</sup> Given that most of the organs envisaged under the AU Act have been established, it is legitimate to ask why the constitution of a judicial organ is being unreasonably delayed.<sup>131</sup> Is this delay

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128. *Merger Protocol*, *supra* note 44 at preamble.

129. AU Doc Ex.CL/Dec.306 (IX) (June 2006).

130. *AU Act*, *supra* note 68 at preamble; *Merger Protocol*, *supra* note 44 at preamble.

131. The following are the Principal Organs of the AU: Assembly of the Union, Executive Council, Pan-African Parliament, Court of Justice, Commission, Permanent Representatives Committee, Specialised Technical Committee, Economic, Social and Cultural Council, Peace and Security Council, and Financial Institutions. *AU Act*, *supra* note 68 at art 5.

caused by lack of will or means (or both)? Already, efforts are on to further amend the Merger Protocol to fit the yet-to-be-established Court with criminal jurisdiction over international crimes "committed on African soil".<sup>132</sup> When will this Wilderness Journey end? Is it even a journey with a goal and an object, like Jason going to find the Golden Fleece?

This final Part reflects on Africa's journey to realise human rights, democracy, rule of law and sustainable development as well as the road not yet taken.

### **Acknowledging Some Milestones**

As previously indicated, Africa has witnessed the proliferation of various supranational institutions in the last decade, some having bearings on human rights. There are also sub-regional judicial courts that interpret and enforce human rights instruments in addition to treaty laws on integration. The foremost sub-regional judicial institutions include the Economic Community of West African States (ECOWAS) Court of Justice, the East African Community (EAC) Court of Justice, and the Southern African Development Community (SADC) Tribunal. In principle, each of these courts is expected to contribute towards strengthening the rule of law, developing international economic law and protecting human rights.

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132. Decision on the Implementation of the Assembly Decision on the International Criminal Court Doc.EX.CL/670(XIX), AU Doc Assembly/AU/Dec.366(XVII) (July 2011), para 8 [Decision on ICC] (asking "the [AU] Commission in collaboration with the Permanent Representatives' Committee to reflect on how best Africa's interests can be fully defended and protected in the international judicial system, and to actively pursue the implementation of the Assembly's Decisions on the African Court of Justice and Human and Peoples' Rights being empowered to try serious international crimes committed on African soil"). See Nsongurua Udombana: "The ICC, African Union, and Politics of International Criminal Justice" (forthcoming, on file with author).

In about a decade of its existence, the AU has built an impressive architecture for the protection of human rights and peoples' rights and for the promotion of rule of law, democracy and good governance, and sustainable development in Africa. It has also adopted more than a dozen treaties and unveiled more than a dozen institutions touching on policy-formulation, decision-making, implementation, enforcement and/or support for democracy, good governance, rule of law, human rights, peace and security.<sup>133</sup> The AU has called on its Member States to adopt policies and mechanism that will create safe, decent and competitive employment opportunities,<sup>134</sup> in recognition of the endemic unemployment situation in Africa. One positive outcome from these developments is that citizens are increasingly informed of human rights issues. On occasions, governments have been compelled to explain on how their policies and practices implicate on human and peoples' rights, whether in relation to land distribution in Zimbabwe or environmental despoliation in Nigeria's Niger Delta.

However, many problems remain, as the next segment examines.

### **The Road Not Yet Taken**

The decision to integrate the ACJ with the Human Rights Court could be a blessing in disguise. The Court, when established, could become a sort of 'High Court' taking on

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133. Report of the Study on the Implications of Expanding the Mandate of the African Court of Justice and Human Rights to try Serious Crimes of International Concern, AU Doc Legal/ACJHR-PAP/5(II) (Nov 2010), at para 2 [*Report of Study*].

134. Decision on the Theme: "Accelerating Youth Empowerment for Sustainable Development Doc. Assembly/AU/2(XVII)", AU Doc Assembly/AU/Dec.363(XVII) (July 2011), at para 5(1).



broader issues of significance to all of Africa. Potentially, it could also serve as an apex court for the various sub-regional courts currently in existence.<sup>135</sup> However, this optimism is tempered with scepticism for a number of reasons.

### 1. Same Old Challenges

Notwithstanding the wonderful initiatives to promote rule of law, democracy and good governance, and sustainable development in Africa, several challenges remain. There is still the challenge of gross human rights abuses and impunity by the very leaders who have pledged to protect lives and properties. Africans still groan under yokes of abusive governments that 'threaten the innocent and spare the guilty'<sup>136</sup> – from Zimbabwe to Libya, Uganda to Ethiopia, Gambia to Rwanda, Liberia to Swaziland, and Algeria to Egypt, to mention a few bastions of crudity of power. The African Commission still receive reports of unabated human rights violations, "including extrajudicial killings, torture and inhuman and degrading treatment and punishment; restriction on freedom of expression and the press, association, assembly, arbitrary detention and arrests of journalists, human rights defenders and political opponents".<sup>137</sup>

Corruption compounds the problem, as ruthless rulers entrench and enrich themselves at the price of their peoples' dignity. There is the challenge of peace and security, as sounds of AK47 still reverberate in half a dozen African countries –

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135. Olufemi Elias: "Introductory Note to the Protocol on the Statute of the African Court of Justice and Human Rights" (2009) 48 *ILM* 334 at 335 [Elias, "Introductory Note"] (noting the significance of creating "a pan-African court of general competence").

136. In Latin, *minatur innocentibus qui parci nocentibus*.

137. African Commission on Human and People's Rights, Activity Report 2008 EX.CL/446(XIII), at para 12 (referring to the human rights situation in Africa as "bleak and a cause for concern").



including the Democratic Republic (DR) of Congo, Somalia, and Sudan. The AU Assembly observed as much during its recent Summit in Equatorial Guinea: "Africa continues to face serious challenges in the area of peace and security, despite the significant progress made in conflict resolution and peace building."<sup>138</sup> Concomitant with conflicts is the challenge of political instability, as coups and attempted coups still threaten constitutional democracy and governance in Africa. Several coups have occurred in Africa since the AU Act, which prohibits unconstitutional changes of governments,<sup>139</sup> entered into force.<sup>140</sup>

In each case, the AU was unwilling to recognize the government that came to power through coup, as enjoined by the AU Act,<sup>141</sup> but some of the regimes had popular and political support within the state.<sup>142</sup> It would appear that some of the political crises and conflicts in Africa are triggered by years of brutal dictatorships and by the current deep global economic recession.

138. Decision on the Report of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa Doc. Assembly/AU/4(XVII), AU Doc Assembly/AU/Dec.369(XVII) (July 2011), para 3.

139. See *AU Act*, *supra* note 68 at art 4(p) (condemning and rejecting "unconstitutional changes of governments").

140. These include Togo (2005), Mauritania (2005 and 2008), Guinea (2008), Madagascar (2009), and Niger (2010).

141. *Ibid* at para 30 ("Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union"). The AU has developed a policy of strongly opposing unconstitutional regime change. See Thomas Bassett & Scott Straus, "Defending Democracy in Cote d'Ivoire Africa Takes a Stand" (2011) 90 *Foreign Aff* at 130 (commending the diplomatic actions by the AU and ECOWAS during the constitutional crisis in Cote d'Ivoire).

142. Eki Omorogbe: "A Club of Incumbents? The African Union and Coups d'Etat" (2011)44 *Vand J. Transnat'l L* 123 (calling on the AU to pursue a more nuanced policy on the problem of coups in Africa).

There is the challenge of how to positively create an environment for sustainable economic growth and guarantee to all persons a life of dignity, prosperity, and happiness. Terrorism, militancy, and religious extremism continue to strike fear on the population of many countries. In some of Nigeria's major cities, the *Boko Haram*<sup>143</sup> sect is terrorising persons and agencies, making some officials and experts worry that a branch of al-Qaeda has spread its influence to that country.<sup>144</sup>

## 2. *Lack of Political Will to Implement and Enforce Decisions*

A related challenge is the lack of political commitment of states to implement and enforce its decisions. For example, only three countries – Burkina Faso, Libya, and Mali – have so far ratified the Merger Protocol.<sup>145</sup> The ratification is an average of one a year; at this speed, it probably will take fifteen years to secure the needed fifteen ratifications before the operationalization of the Court. It is not clear why the Merger Protocol did not provide for implied ratification in respect of states that have already ratified the two earlier Protocols. The Draft Protocol provided that, for such states, the signing of the Protocol “shall constitute consent to be

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143. Meaning, “Western Education is evil”.

144. Karen Leigh: “Nigeria's Boko Haram: Al-Qaeda's New Friend in Africa?” *Time World*, Aug 31, 2011, available at <http://www.time.com/time/world/article/0,8599,2091137,00.html> (“Until recently, the group Boko Haram has conducted attacks on Nigerian government targets in what most terrorism experts considered an indigenous campaign to further the organization's aim of installing Islamic law in West Africa's most volatile country. Friday's attack [on U.N. building in Abuja] now has officials and experts worrying that a branch of al-Qaeda has spread its influence to Nigeria”).

145. List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice And Human Rights, as at Jan 27, 2011, online: African Union [http://www.au.int/en/sites/default/files/9999Protocol\\_on\\_Statute\\_of\\_the\\_African\\_Court\\_of\\_Justice\\_and\\_HR.pdf](http://www.au.int/en/sites/default/files/9999Protocol_on_Statute_of_the_African_Court_of_Justice_and_HR.pdf).

bound”,<sup>146</sup> unless an intention to the contrary is expressed. This vital provision was intended to ensure a timely entry into force of the Merger Protocol, but it was regrettably omitted in the final document.

This half-hearted attitude is also shown in the number of states that have so far ratified the Human Rights Protocol – 26 states,<sup>147</sup> just about half of the present 53 Member States of the AU. Of this number, only Burkina Faso, Malawi, Mali, Tanzania, and Ghana, have made the Article 34(6) Declaration accepting the jurisdiction of the Court to receive cases directly from individuals and NGOs.<sup>148</sup> The delay in ratifying the Protocol “is an impediment and does not enable the Court to discharge its duties smoothly and attain its goals as the judicial body responsible for the protection and enhancement of human rights”.<sup>149</sup> Similarly, the failure of many of the ratifying states to make the Article 34(6) Declaration “may have a negative impact on access by African States and citizens to the Court”.<sup>150</sup> Indeed, as long as a good number of Member States do not ratify the Protocol relating to the establishment of the Court, or do not make the declaration to accept the jurisdiction of the Court to directly receive cases instituted individuals and non-governmental organizations, access to the Court will

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146. *Draft Protocol*, *supra* note 41 at art 8(2).

147. AU List of Countries Which Have Signed, Ratified/Accessed to the, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, online: African Union <<http://www.au.int/en/sites/default/files/992achpr.pdf>>

148. *Ibid.* Tanzania’s Article 34(6) Declaration provides that, “such entitlement is only to be granted to such NGOs and Individuals once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania” *ibid.* This qualification is superfluous, since the exhaustion of local remedies is already an admissibility requirement under the African regional human rights system.

149. Activity Report 2010, at para 9.

150. *Ibid.* at para 10.



remain extremely limited and the legal system for the protection of human and peoples' rights through the Court would not play its role on the continent fully.<sup>151</sup>

Five years after its establishment, the Arusha Human Rights Court is yet to conclude a single matter on its merit, except for a few admissibility and interlocutory decisions. At least one judge, who was appointed to the Court for a six-year tenure, resigned his appointment few years thereafter, probably due to frustration.<sup>152</sup> Some judges who were elected for an initial tenure of two or even four years – based on a staggered arrangement<sup>153</sup> – completed their tenure without hearing a single case on its merit. On the face of it, the resources used in capacitating those expired Judges, including their honoraria, have been in vain. Meanwhile, the Court's approved budget for 2010 was USD 7,939,375, made up of USD 6,169,591 for operations, and USD 1,769,784 for programmes.<sup>154</sup> Does the end justify this means?

### *3. Disobedience to Judicial Orders and Threats to Sub-Regional Judicial Independence*

Enforcement of judicial remedies, whether domestic or international, is contingent on the political will of states. The recent contemptuous disobedience of the Court's order for

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151. *Ibid* atpara 26.

152. Activity Report 2010, at para 3 ("Judge Githu Muigai (Kenya) who was elected in July 2008 for a six-year term of office informed the President of the Court by letter of 3 June 2009 of his resignation").

153. *Human Rights Protocol*, *supra* note 23 at art 15(1) (providing: "The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years").

154. Decision on the Budget of the African Union for the 2010 Financial Year2 Assembly/AU/13(XIV), AU Doc Assembly/AU/Dec.287(XIV) (Jan. 2010), para 2 [*Decision on Budget*].



provisional measures by the Government of Libya<sup>155</sup> – State Party to the African Charter – shows that states are likely to ‘trample under feet’ the decisions of a future unified court. In Africa, hope dissolves into anxiety when one reflects on states’ attitude towards the African Commission. Except for limited exceptions, governments’ record in implementing decisions of the Commission is abysmal. At each yearly summit of the OAU/AU Assembly, African leaders take note of the Commission’s “Activity Report;” commends it for the work it accomplished and urges it to pursue and intensify efforts in this regard; reiterates the need for the Commission to be provided with adequate resources to remove donor dependence and enable it discharge its mandate effectively; and, finally, authorize the Commission to publish its Report.<sup>156</sup> African governments do everything to flatter the Commission except to respect its recommendations; and such non-compliance constitutes “one of the major factors of the erosion of the Commission’s credibility”.<sup>157</sup>

Many states are working hard to undermine the independence, sometimes the very existence, of the existing sub-regional courts that these states created. In July 2008, the ECOWAS Court ordered Gambia to release Chief EbrimaManneh, a journalist who was arrested in 2006, and to pay him USD 100,000. The Gambian Government not only ignored the ruling; it brought a proposal before ECOWAS

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155. *Order for Provisional Measures*, online:[http://www.african-court.org/en/images/documents/Orders-Files/ORDER\\_Application\\_002-2013\\_African\\_Commission\\_v\\_Libya.pdf](http://www.african-court.org/en/images/documents/Orders-Files/ORDER_Application_002-2013_African_Commission_v_Libya.pdf) (visited 14/04/2014).

156. *Decision on the Report of Activities of the African Commission on Human and Peoples’ Rights*, AU Doc EX.CL/446(XIII) (2008).

157. *African Commission, Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach*, OAU DOC/OS/50b (XXIV) (1998), para 2.

Assembly to amend Articles 9(4) and 10(d) of the Supplementary Protocol of the ECOWAS Court,<sup>158</sup> which grants direct access to the Court in cases involving violation of human rights, making the rule of exhaustion of domestic remedies not applicable before the Court.<sup>159</sup>

The SADC Tribunal has had a similar experience. In *Campbell v Zimbabwe*<sup>160</sup> and a series of similar cases,<sup>161</sup> the Tribunal held Zimbabwe in breach of the SADC Treaty by compulsorily acquiring farms from white landowners without offering them proper compensation and denying them a judicial remedy. Zimbabwe refused to honour the judgements, which Mugabe referred to as 'nonsense' and 'of no consequence'. The government issued a statement to the effect that the state was not bound by the regional court's ruling, regarding it as being null and void of any legal effect.<sup>162</sup> The SADC Summit did not push Zimbabwe to comply with its treaty obligation. Instead, the SADC leaders set up a committee to review the Tribunal's mandate and prohibited the Tribunal from receiving new cases or holding hearings until August 2012, when the review process is expected to

158. Supplementary Protocol A/SP.1/01/05.

159. Amnesty Int'l, Public Statement: "West Africa: Proposed Amendment to ECOWAS Court Jurisdiction is a Step Backward", AI Index: AFR 05/005/2009, online: Amnesty International <<http://www.amnesty.org/en/library/asset/AFR05/005/2009/en/b83f0c07-58d7-447b-9b2e-8d90c721ad96/af050052009en.html>> (calling on ECOWAS Member States "to reject the proposed amendment by The Gambia, and to ensure that the jurisdiction of the Court is not eroded in any way with regard to the adjudication of human rights cases from the sub-region").

160. *Campbell v. Zimbabwe*, SADC (T) 2/2007.

161. *Gideon Stephanus Theron & Others v Zimbabwe*, SADC (T) 02/2008; SADC (T) 03/2008; SADC (T) 04/2008; SADC (T) 06/2008.

162. "Zimbabwe not bound by regional court ruling: Justice Minister", online: *Jurist* <<http://jurist.org/paperchase/2010/07/zimbabwe-is-not-bound-by-sadc-rulings-justiceminister.php>>.

complete.<sup>163</sup> In essence, the SADC Tribunal is being persecuted for performing its judicial functions based on the evidence available before it. Gratuitous attacks of this nature raise questions whether Africa is ready for supranational courts.<sup>164</sup> The growing trend to intimidate judicial bodies dents the economic integration agenda in Africa; and it is sad that this is happening at a time when the AU and its Member States are calling for "African solutions to African problems".

#### ***4. The Perennial Problem of Institutional Underfunding***

The AU is proposing a unified court at a time of considerable institutional confusion and flux. Many new regional institutions have come on board in the last decade, some with conflicting mandate with earlier mechanisms. Many of these institutions are grossly underfunded by their parent bodies, resulting in their inability to effectively perform their statutory mandates. Many of these institutions still carry bowels to beg for money from the European Union (EU), Canadian International Development Agency (CIDA), German Technical Cooperation Agency (GTZ); Konrad Adenauer Foundation; Danish Institute of Human Rights; McArthur Foundation, Open Society Justice Initiative, and other Western institutions.

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163. Precious Ndlovu: "Campbell v Republic of Zimbabwe: A Moment of Truth for the SADC Tribunal" (2011) 1 *SADC LJ* 63 at 78 ("While the review of the Tribunal's structure and function is not in itself irregular, the same cannot be said of the effect that this decision has had on the work of the Tribunal. The Tribunal's power to receive and hear new matters has been withdrawn. The Summit failed to renew the terms of office of the judges whose tenure had expired. ... Consequently, the Summit's decision in intent and effect suspended the Tribunal").

164. "Is Africa Ready for Supranational Courts?" *Africa Legal Aid Newsletter* (Sept 2011), online: Africa Legal Aid  
<<http://www.africalegalaid.com/IManager/MailingWeb/5300/XZmTTRG8Ua6k/385401/1457169#>>.



The African Commission again provides a telling illustration of institutional neglect; and this is how Viljoen expresses the problem:

Despite repeated calls by the [AU] Assembly, the Commission and its Secretariat remain under-resourced, and are forced to rely on outside funds for most of its promotional work and for the appointment of at least a bare minimum of legal officers. Despite making lofty declarations and commitments of support to the Commission, especially on the occasion of the 20-year commemoration of the adoption of the Charter, the AU allowed the Commission's staffing situation to deteriorate into an unprecedented crisis.<sup>165</sup>

The approved budget for the African Commission for the 2008 fiscal year was USD 6,003,856.86, comprising an Operational Budget of USD 4,584,390.00, and a Programme Budget of USD 1,419,466.86.<sup>166</sup> In 2010, that figure dropped to USD 4,929,852 of which USD 2,968,874 was for Operations while USD 1,960,978 was for Programmes.<sup>167</sup> Of course, there is always a wide margin between approved sums and actual releases. Meanwhile, the sum approved for the Commission in 2010 was far less than that of the amorphous organ called PAP, which approved budget stood at USD 14,149,250, made up of USD 9,129,736 for Operations and USD 5,019,514 for Programmes.<sup>168</sup> Such huge gaps indict a

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165. Viljoen, *supra* note 34 at 315.

166. *Activity Report 2008*, *supra* note 137 at para 38.

167. *Decision on Budget*, *supra* note 154 at para 2.

168. *Ibid.*



lack of prioritization of needs by the AU. An organization that cannot, or will not, fund its vital institutions should not complain of external interference. Actually, no judicial or quasi-judicial institution is truly independent until it is independent of donor funding. As Magliveras opined, “[d]emocracy, the rule of law and the protection of human rights are a costly business. None can be achieved on the cheap”.<sup>169</sup>

### **What to Do**

Africa’s past experiment with institution building have seemingly been based on an evolutionary paradigm, where all things evolved in a natural and inexorable process of development from simpler to more complex and efficient forms, following the principle of “survival of the fittest.” The thinking has been that, with minimal or no support, Africa’s institutions will take their destinies in their own hands and eventually perfect themselves. Such jaundiced thinking explains why many of Africa’s key institutions have atrophied, lacking strong financial and operational resources from states that set them up. In principle, the proposal to merge the two continental judicial institutions is part of the implementation of the AU Assembly’s decision to rationalize its institutions, avoid duplication of mandate, and ensure cost effectiveness within the AU.<sup>170</sup> The challenge is how to bring this long process to a logical end, while also ensuring effective

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169. Konstantinos Magliveras, “The African Union (AU)”, *ASIL Reports on International Organizations* (2010), online: ASIL  
<[http://www.asil.org/rio/africanunion\\_2008.html#footnotes](http://www.asil.org/rio/africanunion_2008.html#footnotes)>

170. Elias, “Introductory Note”, *supra*note 135 at 334 (“The decision [to merge the two Courts] was based on concerns regarding the increasing number of African Union institutions and the cost of maintaining them. The main idea was to consolidate the limited resources available for a single court”).

enforcement of human rights guaranteed in all relevant instruments ratified by states parties. This segment is a further reflection on some of these issues.

### 1. 'Law Speaks Through Power'

The interests that human rights embody are sufficiently strong enough to justify the imposition of duties on states.<sup>171</sup> This assumption is implicit in the adoption and ratification of human rights treaties and in the *pactasunctservanda* requirement arising therefrom, including the obligation to adopt legislative and other measures to give effects to these rights at the domestic level. This assumption also provides justification for complementary international mechanisms to protect human rights.<sup>172</sup> An independent court that is sufficiently resourced is a more suitable mechanism to interpret the clusters of legal relations and interests involved in human rights and to provide effective remedies for their violations, based on the legal maxim, *ubi jus ibiremedium*. Law speaks through power, not dialogue. Besides:

It is against international law and the spirit of African solidarity to put African citizens in a situation where they are bound by the various Treaties, Protocols, Declarations and Decisions made under the ambit of the AU and the RECs, yet have no recourse through an independent and impartial tribunal, when their rights, guaranteed under the said instruments, are violated.<sup>173</sup>

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171. Joseph Raz: *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 165 *et seq.*

172. Pavlos Eleftheriadis: *Legal Rights* (Oxford, Oxford Univ Press, 2008) (offering a general account of legal rights).

173. Communiqué of the Inaugural Colloquium of Legal Scholars on the African Human Rights System, convened by the Pan African Lawyers Union, in Arusha, Tanzania (July 2011), para 9 [PALU Communiqué] (on file with author).

To reap the fruits of economic integration envisaged under the AU Act, African states must uphold international rule of law. These states bear the primary responsibilities for the establishment and proper functioning of the proposed Merged Court. These obligations are imperative and positive, entailing investing in infrastructure and other resources, including personnel, paper, computers, printers, and a functional library. The Merged Court, when established, must not be subjected to financial ridicule, by allowing it to carry bowels and beg for funds from the global community. It should be properly resourced so to enable it to face the critical task of human rights protection and allied matters. Only an empowered and independent court can protect human rights, develop international law, strengthen the rule of law, deepen democracy, and deal with the many legal and other crises that continue to plague Africa.

## **2. *'Eternal Vigilance is the Price of Liberty'***

The endless adoption of protocols with no visible and viable court to check impunity is wearisome, but the civil society must not give up. Whatever modest progress that Africa has made in mainstreaming human rights in regional politics and policies has been through relentless struggles by the civil society, the main analytical paradigm in African politics. The repressive post-colonial governments think first of national sovereignty and the personal good of the ruling before they consider the common good, if at all. The civil society, including human rights NGOs, should realise that one victory is not, and should never be, the end of the struggle to enthrone accountability in Africa. They should work with governmental and other institutional stakeholders to make the court project a reality. Africa's governments should be reminded that they



have little to gain by not meeting their international human rights commitments. This civil society pressure should run concomitantly with human rights monitoring, advocacy, and resource assistance.

Significantly, Africa's inter-governmental organisations (IGOs) now recognise the role of civil societies in the advancement of human rights. The Grand Bay Declaration, adopted at the first OAU Ministerial Conference on human rights in 1999,<sup>174</sup> acknowledged the positive contributions that African NGOs have made in the promotion and protection of human rights.<sup>175</sup> It recognised the importance of promoting an African civil society and calls on African governments to offer their constructive assistance to these non-state actors in order to consolidate democracy and development.<sup>176</sup> A year thereafter, the AU Act was adopted, in which States Parties promised "to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples".<sup>177</sup> There is, thus, a normative framework for civil society's engagements with AU organs.

Not surprisingly, many indigenous African civil societies, like PALU and the Coalition for an Effective African Court, have consultative status with the AU Authority. These and others should continue to engage the AU organs and Member States to ensure that human rights are not lost in the morass of endless protocols. Indeed, all Africans must become vigilantes for human rights accountability, since eternal vigilance remains the price of liberty.

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174. Mauritius OAU Conference on Human Rights, (1999) 36(4) *Africa Research Bulletin: Political, Social, and Cultural Series* 135 [Grand Bay Declaration].

175. *Ibid* at preamble.

176. *Ibid* at para 17.

177. *AU Act*, *supra* note at 68 preamble.

## **Conclusion: Between the Mountain Top and the Promised Land**

Africans have wandered for years in the wilderness of unfulfilled expectations in the enjoyment of their basic rights and freedoms. In the last few years, leaders, who hitherto turned their countries into a human rights graveyard, took their citizens to the 'Mountain Top' to view the Promised Land through the prisms of multiple human rights instruments. The African Charter and its supplementary protocols offered so much promise for Africans – promise of dignity, liberty, fair trial and rule of law, education, work and social security, health and healthy environment, women equality and empowerment, political participation and good governance, peace, *etcetera*. However, it is no longer certain how soon Africans will enjoy these promises, given that the journey to human rights accountability has been a zigzag; one step forward, two steps backward – sometimes no movement at all. The 1998 Protocol is now almost unrecognisable due to the numerous alterations, re-organisations, re-arrangements, and re-enactments of its provisions. The Human Rights Court faces the danger of being lost in transition.<sup>178</sup>

The African human system has the potential to deliver on its promise, but that will depend on States Parties' willingness to undertake a radical restructuring of its institutional mechanism for protection. While adopting the Merger Protocol, African States expressed the sentiment that, the establishment of an African Court of Justice and Human Rights shall assist in the achievement of the goals pursued by the African Union and that the attainment of the objectives of the

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178. Dan Juma: "Lost (or Found) in Transition – The Anatomy of the New African Court of Justice and Human Rights" (2009) 13 *Max Planck YBUNL* 267.

African Charter ... requires the establishment of a judicial organ to supplement and strengthen the mission of the African Commission ... as well as the African Committee...<sup>179</sup>

Agreed! In fact, the Court could also contribute towards healing a continent torn apart by coups, dictatorships, strife, wars, famine, and, above all, genocide. Such a court is particularly relevant at a time like this when human rights are once again under great strains in Africa, when many states are still far from resembling a coherent polity, and when politicians are becoming increasingly selfish and cynical. Whether the Court will live up to these great expectations is a different matter entirely – optimism is the motor that drives hope, without which there would be despair to fulfil its own prophecy of doom. The citizens' immediate concern is how and when the AU and its Member States will transit from the current Shakespearean dilemma of 'to be or not to be' and turn hope into reality. The milk and honey is beyond this wilderness.

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179. *Merger Protocol*, *supra* note 44 at preamble.